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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF WESTCHESTER
PUBLIC UTILITY SERVICE AGENCY,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should legislative history be used by a federal agency to misinterpret a statute by adding a concept, "yardstick competition," which has no basis in law or economics and which contradicts the express purposes and intent of the statute?

2. Should a state agency, the New York Power Authority (PASNY), rather than the Federal Energy Regulatory Commission (FERC), be accorded deference in its interpretation and implementation of a unique federal statute where Congress gave PASNY the primary responsibilities?

3. Should FERC be permitted to intrude upon state sovereignty, with neither

express nor implied statutory authority to do so, by imposing an arbitrary doctrine, "yardstick competition" upon New York and other states' public utility regulation?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit were those in the caption, and as indicated below.[1]

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1. As petitioners: Allegheny Electric Cooperative, Inc., Vermont Department of Public Service, New York City Public Utility Service, Upstate Public Utility Services Association, James E. O'Neil, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, Connecticut Municipal Electric Energy Cooperative,Massachusetts Municipal Wholesale Electric Company and Power Authority of the State of New York,

As intervenors: Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric & Gas Corporation City of Cleveland, Ohio, Public Service & Gas Company, City of New York, Port Authority of New York & New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Co.

The New York City Public Utility Service and the Vermont Department of Public Service petition separately for certiorari.

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COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

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-against-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner County of Westchester Public Utility Service Agency (COWPUSA) herein respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1990, and for which a rehearing was

denied by that Court on February 12, 1991.

OPINIONS BELOW

The decision of the Federal Energy Regulatory Commission is reported at 48 FERC ¶61,124 (1989) (Opinion 329)(64a).[1] The decision of the Commission denying rehearing is reported at 49 FERC ¶61,069 (1989)(110a). The decision of the United States Court of Appeals is reported at 922 F.2d 73 (2d Cir. 1990) (1a).

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1. The opinion is reprinted in the Appendix to the Petition for a Writ of Certiorari. The Appendix is jointly filed by petitioner herein and by New York City Public Utility Service and by Vermont Department of Public Service, which petition separately for review by this Court. Citations to the Appendix are made to the page and number therein as "(__a)". Materials not included in the Appendix appended hereto but which appeared in the Joint Appendix filed in the Court of Appeals shall be referred to as "__A. Vol.__".

BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 17, 1990 (1a). The Second Circuit denied a rehearing on February 12, 1991 (115a). This petition is filed within 90 days thereof pursuant to 28 U.S.C. §2101(c). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 836 of Title 16 of the United States Code is set forth in the Appendix (116a).

STATEMENT OF THE CASE

The County of Westchester Public Utility Service Agency (COWPUSA) agrees with the statement of the case as recited in the Petition for Certiorari of the New York City Public Utility

Utility Service (NYCPUS). Therefore, set forth below is a summary of those additional facts pertinent to COWPUSA's petition.

The Niagara Redevelopment Act (NRA), 16 U.S.C. §§836 and 836a, authorized the development of the United States' share of the power of the Niagara River pursuant to a treaty with Canada, the Niagara Treaty, 1 U.S.T. 694. Under the NRA, the Federal Power Commission (now Federal Energy Regulatory Commission or FERC) was authorized and directed under the NRA to issue PASNY a license for the construction and operation of a hydroelectric project. The Niagara Power Project followed. It was funded and constructed by the New York Power Authority (PASNY), an instrumentality of the State of New York. No federal funds nor substantial federal role

were involved. Fifty percent of project power is, however, subject to what the court below has characterized as a "federal-type" preference clause, the interpretation of which is the subject of this litigation.

In 1976, in a case involving the preference entitlements of neighboring states, the Federal Energy Regulatory Commission (FERC) defined "public body" in such a way that municipal distribution agencies (MDAs) would apparently meet the preference requirements of the NRA. 55 FPC 1109, 1113-1116 (1976) (2900-2901A, Vol.IX).

COWPUSA is an MDA created by Westchester County in 1982 and authorized under Article 14-A of the New York General Municipal Law to sell and distribute electricity (360A, Vol. II). COWPUSA began receiving preference

power from the New York Power Authority, for the benefit of Westchester residents and industry, in July 1985.

However, in 1986, complaints were filed with FERC by various municipal utility associations challenging PASNY's allocation of preference power to the MDAs. After an adjudicatory administrative hearing and initial decision, the FERC Commissioners upheld the administrative law judge's holding that public bodies must provide "yardstick competition" and meet related requirements[2] in order to receive preference power under the NRA.

Municipal Electric Utilities

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[2] The discussion of "yardstick" in this petition includes these related requirements that the public body 1) be responsible for meeting the requirements and concerns of its retail customers, and 2) have control of the electrical distribution system.

Ass'n of New York State v. PASNY (Opinion 329), 48 FERC ¶61,124 (1989) (64a). The Second Circuit has upheld this interpretation in the present case.

Municipal utilities and rural electric cooperatives have received the predominant share of Niagara "preference" power to date. However, their proportionate use of power in New York State has apparently decreased over the years. At the time the NRA was enacted, they used roughly five percent (5%) of New York's power. Hon. Jacob Javits' statement in Senate Debate, 103 Congressional Record 14443 (August 12, 1957). By the time of the FERC hearing in the present case in 1986 and 1987, their customers constituted a mere two percent (2%) of the State's

residential consumers. (2883A, Vol. IX).

Consequently, as presently interpreted by FERC and the Second Circuit, preference power is available only to a small proportion of New York consumers. Nevertheless, it is economically impracticable for municipalities presently without public power to meet the "yardstick" criteria (e.g., the ability to displace incumbent private utilities) in order to qualify for receipt of preference power. Presently, Niagara preference power is not widely distributed to New York State consumers, which directly contradicts the stated goals of the NRA.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in the case at bar because the Court

of Appeals for the Second Circuit has erroneously decided an important issue of statutory interpretation which must be settled by this Court. The Second Circuit has used questionable legislative history to engraft onto the NRA a "yardstick competition" test and related requirements which defeat the express purposes and intent of the NRA. Under FERC's "yardstick" requirement,[3] a miniscule number of consumers receive virtually all the Niagara preference hydropower. In addition, the "yardstick competition" requirement has interfered with PASNY's implementation of the NRA and intrudes upon New York and neighboring states' local public utility

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[3] In the discussion below, the term "yardstick" will include the related requirements set forth in footnote 2, supra.

regulation, in violation of the principles of federalism.

These are important issues of law and of vital importance to the administration of the NRA. Therefore, certiorari should be granted. Federal Power Comm'n v. So. Calif. Edison Co., 376 U.S. 205 (1964).

POINT I

FERC'S "YARDSTICK COMPETITION" REQUIREMENT IS BASED UPON DUBIOUS LEGISLATIVE HISTORY CONTRARY TO THE CLEAR LANGUAGE AND INTENT OF THE NIAGARA REDEVELOPMENT ACT (NRA)

FERC asserts in this litigation that public power can compete with, or somehow provide a "yardstick" by which to compare, incumbent private utilities' service and rates. The Court should reject this concept since "yardstick competition" is a nonsensical economic

doctrine which is neither expressly nor implicitly part of the intent or purpose of the NRA. The yardstick competition concept is solely a product of a gross misuse of legislative history by FERC to regulate that which Congress did not intend it to regulate.

Moreover, as applied in this case, the "yardstick" concept actually defeats the goals of the NRA. The clear intent of the NRA is that Niagara hydropower be widely distributed by the State of New York (through PASNY) to rural and domestic users within New York and neighboring states. Congress could not have intended, as the NRA is presently interpreted, that a mere two percent (2%) of the State receive the overwhelming share of the preference hydropower.

A. **The NRA is Clear on its Face and Neither Contains nor Implies Any Concept of "Yardstick Competition"**

The preference clause of the NRA is clear on its face. It states:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. (emphasis added)

16 U.S.C. §836(b)(1).

The above language unequivocally states that Niagara preference power is intended for the people as consumers at

the lowest available rates and that it should be distributed so as to encourage the widest possible use. The NRA also provides that PASNY shall give preference to "public bodies."

FERC now defines "public body" in such a way that virtually all of the preference power is given to a small minority of consumers. FERC's test for qualification is that the public body must provide competition with the private utility, which the public body will provide if it:

a) creates a threat of takeover or displacement of the public utility;

b) substantially meets the energy needs of its customers;

c) provides customers and regulators with a basis for comparing the rates and quality of service;

d) is directly responsible for meeting the requirements and responding to the concerns of its retail customers with the ability to initiate corrective action; and

e) has control of the distribution goals[4] (10a).

The above test for qualification for preference power defeats the NRA's enunciated system.

1. The NRA Requires "Widest Possible Use" of Preference Power

FERC and the court below fail to explain how the present allocation of preference power, and the use of FERC's "public body" test, complies with the NRA mandate to encourage the "widest possible use" of preference hydropower. Even assuming, arguendo, that yardstick competition is possible, the fact remains that there are only a very small number of such purported "yardstick competitors." They are municipal utilities and electric cooperatives which may be able to sell power

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[4] 922 F.2d 73, 78-79 (2d Cir. 1990)

inexpensively, but which cannot or will not expand their territories, at least in part due to the limited supply of Niagara hydropower. For example, upstate New York public utilities can sell power for 3 cents per kilowatt hour, but have insufficient power to expand into New York City, where consumers pay 16 cents per kilowatt hour (2631-32A, Vol. IX). And in Rhode Island, the tiny Pascoag Municipal Water and Fire District, serving fewer than 3,000 people, receives the only preference power in that state.

Moreover, there is no reason for the public utility to expand its territory to displace another utility when this will only diminish the amount of inexpensive power for its present customers. To displace a neighbor will mean increased rates. To limit the

hydropower to current recipients will ensure their continued low rates. However, this is contrary to the "widest possible use" contemplated by the NRA.

There is every reason to conclude that there is no place for "yardstick competition" within the NRA. "Yardstick" allows only the few fortunate enough to reside within a public utility's franchise territory to enjoy the benefits of extremely inexpensive hydropower. This discourages wide use, in direct contravention of the statutory mandate.

2. Principle Goal of NRA Cannot Be To "Foster Competition," When the NRA Itself Provides Power to "Competitors"

The language of the NRA neither requires nor implies that competition be promoted between public bodies and

private utilities. On the contrary, the NRA explicitly allows private utilities to receive preference power which power is withdrawable only if necessary to meet the "reasonably foreseeable needs" of the preference customers.[5] NRA Sec. 836(b)(1). The court below states that the primary goal of the NRA is to make public bodies "yardsticks" by which to compare private utilities. However, to contend that preference power is to be used to promote yardstick competition, but at the same time allocate competitors such power, is to frustrate the professed "yardstick" goal and is self-contradictory.

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[5] In addition, the NRA provides that PASNY is to lease, purchase or construct lines for the wholesale transmission of power and energy to preference customers, neighboring states and "privately owned companies." NRA Section 836 (b)(4).

Yardstick competition becomes even less plausible when it is noted that, with regard to power sold to any purchaser for resale, PASNY is to include adequate provision for establishing resale rates. As to these sales for resale, PASNY would hold the key to how much of a "yardstick" any purchaser will be, since PASNY sets the price.

B. There is No Need to Apply Legislative History Because the NRA is Clear on Its Face

As to agency construction of a statute, this Court has stated that if the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, USA v. NRDC, 467 U.S. 837, 842-43 (1984). It is

submitted that FERC's construction of the NRA does not give effect to the unambiguously expressed intent of Congress, and that PASNY's interpretation qualifying petitioner for NRA hydropower does.

The legislative purpose of a statute is expressed by the ordinary meaning of the words used. United States v. James, 478 U.S. 597, 604 (1986). It is presumed that the words used by Congress are conclusive evidence of the legislative purpose. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984), reh. den. 467 U.S. 1267 (1984).

The court below chose to ignore the clear words of the NRA and instead adopted a dubious economic concept based upon legislative history which the Second Circuit itself characterized in

an earlier case as "agonizingly long" and "contain[ing] many statements which taken out of context, appear to support varied interpretations of the statute." PASNY v. FERC, 743 F.2d 93, 105 (2d Cir. 1984).

The NRA is clear and unambiguous on its face. It is only the imported "yardstick competition" requirement which has created conflicting goals and ambiguity. It is clear that the NRA demands that preference power be made available to the "people as consumers" in "such manner as to encourage the widest possible use." NRA §836(b)(1). It is only when the non-statutory yardstick competition requirement is imposed that these goals are not met.

C. Yardstick Competition, at Least in the Context of the NRA Hydropower, Makes No Economic Sense and Is Contrary To the Purpose and Intent of the NRA

As a matter both of economics and reality, the yardstick competition requirement as applied to the NRA restricts preference power distribution to a small segment of consumers. Because the power is comparatively so inexpensive it serves as a "yardstick" to nothing. And because it is of limited, finite quantity, the hydropower cannot realistically be used by its municipal or cooperative recipients to displace private utilities.

"Yardstick competition" only makes sense if it is to compare costs between comparable utilities operating under similar conditions.[6] As one

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[6] Joskow and Schmalensee, "Incentive Regulation for Electric Utilities," 4 YALE JOURNAL ON REGULATION at 34 (Fall 1986).

commentator has stated, "[p]ublicly owned firms with access to subsidized capital and preference power cannot be usefully compared to private firms that lack these advantages."[7] In any event, the private utility, as a "natural monopoly" given an exclusive territory in exchange for rate regulation, need not concern itself with public competition. The private utilities' profits are based upon costs and a reasonable return on capital according to a standard ratemaking formula. The electrical pricing of neighboring utilities is simply irrelevant to this process.

The yardstick competition doctrine is ill-conceived when applied to the Niagara Project. The Second Circuit

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[7] Id. at footnote 77.

came close to conceding this in a prior case where it stated:

> Assuming arguendo the improbability of such [yardstick] competition (although we take judicial notice of the recent sharp decline in the price of oil as a source of private power) "[i]t is not for FERC or ourselves to second-guess [Congress'] basic determination."

Metropolitan Transp. Auth. v. FERC, 796 F.2d 584, 593 (2d Cir. 1986), citing PASNY, 743 F.2d at 105. Furthermore, as explained in the NYCPUS petition for certiorari at pages 31-32, FERC's determination as to yardstick competition is entitled to no special administrative deference, since FERC merely obeyed the prior Second Circuit precedent.

Because the NRA is clear on its face, and because FERC's implementation

of yardstick competition defeats the NRA's stated goals, the concept of "yardstick competition" has no place in the implementation of the Act.

POINT II

IT IS PASNY, NOT FERC, WHICH HAS RESPONSIBILITY FOR COMPLYING WITH AND INTERPRETING THE NRA; PASNY'S INTERPRETATION NEED NOT INCLUDE "YARDSTICK COMPETITION"

The NRA is a unique statute. It does not involve federal hydropower, federal funding or federal land. The federal involvement stems from the treaty entered into between the United States and Canada in 1950 concerning the waters at the international boundary at Niagara Falls. During the debate concerning the enactment of the NRA, it was clearly understood that this was a New York project, not a federal project, and was supported solely by New York

dollars. 103 Congressional Record 13194-13211.

The late Senator Jacob Javits, former Attorney General from New York, also commented about the concept of a "yardstick":

> The yardstick principle in this particular case is quite inapplicable by virtue of the fact that the State of New York, under New York law, has a power authority which fixes the rates for the power it will produce which is going to be resold, no matter who resells it, even if resold over private transmission lines.

103 Congressional Record 14444. Senator Javits' comments remain valid today. For example, NRA Section 836(b)(5) provides for regulation by PASNY, not FERC, of resale rates.

The NRA involves a hybrid preference clause which provides that Niagara hydropower be distributed widely to

rural and domestic users within a reasonable transmission distance, but that this distribution is by a state agency--PASNY. Thus, it appears clear from the NRA that PASNY and state law are to govern the allocation and distribution of preference power within the broad parameters set forth in the NRA.

FERC has turned this statutory scheme on its head by giving itself a lead role concerning Niagara preference hydropower. FERC has made itself the policeman of the NRA even though this is the role of the state agency, PASNY. The NRA clearly states that, in distributing power, PASNY is to 1) give preference and priority to public bodies and nonprofit cooperatives, 2) provide for withdrawal of power from private utilities when needed by public bodies,

3) allocate a reasonable portion of the power to neighboring states, and 4) approve resale rates. NRA Section 836(b)(1,2,5).

The clear intent of the NRA is that PASNY is to implement the NRA without the supervision of FERC. In the one instance where Congress required PASNY to obtain FERC's approval (construction of scenic drive and park), Congress clearly provided for this in the NRA. NRA Section 836(b)(6). Similarly, Congress clearly stated that, if there were any conflict between language of the NRA and the FERC's rules of practice and procedure, the NRA would govern. See, 16 U.S.C. §836a.

The NRA stands in stark contrast to federal laws such as the Natural Gas Act which do intend a comprehensive regulatory scheme and therefore preempt

state regulation. See, e.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi, 474 U.S. 409 (1986). Rather, the NRA presents a situation where Congress has not exercised power to preempt state regulation. Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493 (1989).

FERC's imposition of a "yardstick" requirement upon an agency of the State of New York charged by Congress with distributing the electrical power of the Niagara exceeds what Congress authorized. Congress did not intend for federal preemption by administrative fiat to extend so far.

POINT III

FERC'S "YARDSTICK COMPETITION" PRECONDITION TO NEW YORK AND OTHER STATES' RECEIPT OF PREFERENCE HYDROPOWER INTRUDES ON STATE SOVEREIGNTY AND SO VIOLATES THE TENTH AMENDMENT

The NRA is uniquely local in character. Eighty percent of the preference power is reserved for the benefit of New York consumers. Twenty percent is allowed to states "within reasonable transmission distance." NRA Section 936(b)(2). PASNY is the agency which built and operates the Niagara Project and which distributes its hydropower. To the extent that neighboring states establish entities which can receive preference power in accordance with the NRA, PASNY can distribute to these out-of-state entities. The Congressional debates on the NRA included a discussion that

states could enact laws to allow for receipt of preference power. See, e.g., 103 Congressional Record 13196 (House), 14439 (Senate). Thus, the legislative history is in accord with the plain language of the NRA that the states, and in particular New York through PASNY, were to apply state law in distributing hydropower according to the mandates of the NRA.

The goals of the NRA will be met by this Court's rejection of the concept of "yardstick competition." The licensee, PASNY, as well as qualifying neighboring states, will be able to distribute the preference hydropower "widely," in a manner "primarily for the benefit of the people as consumers, particulary domestic and rural consumers," and at the "lowest rates reasonably possible," pursuant to the terms of the NRA.

Within New York, recipients will be "public bodies" entitled to receive and distribute power under New York law, namely, public utilities, rural electric cooperatives, and municipal distribution agencies. Other states will have the choice to do exactly the same, as petitioners Vermont (VDPS) and Rhode Island have been attempting to do for quite some time.

On the other hand, to allow FERC to preempt state law and policy as to the operation and existence of public utilities, is to permit intermeddling with matters fundamentally of state and local concern. State public utilities are granted monopoly jurisdiction and are extensively regulated. FERC v. Mississippi, 456 U.S. 742, 772 (1982) (Powell, J. concurring and dissenting in part). Federal regulators should only

reluctantly intrude.

This Court has held that state law can survive federal preemption. Pacific Gas & Electric v. State Energy Resources Conserv., 461 U.S. 190, 225 (1983). Indeed, it is assumed that the historic police powers of the States are not superseded by a federal statute unless that is the clear and manifest purpose of Congress. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988). FERC should not be permitted to impose "yardstick competition" upon state and local utility law and policy when this was not the clear intent of Congress.

A holding which permits FERC to place a yardstick competition requirement upon state utility regulation would be, as Justice Powell stated in his partial dissent in

Mississippi, for the federal government to "preempt this important state function" and to break the "longstanding deference to principles of federalism." 456 U.S. at 772. In Mississippi, Congress had expressly granted FERC powers under a comprehensive federal statutory scheme. FERC has received no such powers under the NRA, the latter statute being quite distinguishable.

In the instant case, PASNY and the neighboring states are indeed compelled to become "bureaucratic puppets" of the federal government in the distribution of preference NRA hydropower. Id. 456 U.S. 742, 783, (O'Connor, J. dissent) As to intrusion into traditional local utility regulation, FERC's intrusion upon state sovereignty goes too far.

CONCLUSION

The Second Circuit and FERC have seriously misinterpreted the Niagara Redevelopment Act by reading into the Act, clear on its face, the highly questionable doctrine of "yardstick competition." In addition, FERC has assumed more authority than authorized under the NRA, and intruded into areas so peculiarly of state and local interest as to implicate state sovereignty. Because these issues are of vital importance to the administration of the NRA, Petitioner County of Westchester Public Utility Service Agency (COWPUSA) requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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White Plains, New York
May 10, 1991

GLOSSARY OF ACRONYMS

COWPUSA - County of Westchester Public Utility Service Agency

FERC - Federal Energy Regulatory Commission

NRA - Niagara Redevelopment Act

NYCPUS - New York City Public Utility Service

PASNY - New York Power Authority or Power Authority of the State of New York

VDPS - Vermont Department of Public Service